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No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF FOR PETITIONER ON THE MERITS.

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Questions Presented.

1. Does the public have a First Amendment right of access to the voir dire proceedings of criminal trials and a concomitant right to the transcript of the proceedings?

2. Did the respondent court, in applying the California Supreme Court decision in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980), violate the public's First Amendment right of access to criminal trials?

3. Did the respondent court violate the public's First Amendment right of access to criminal trials by originating and applying a right of privacy of jurors?

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Respondent.

BRIEF FOR PETITIONER ON THE MERITS.

Opinions Below.

The Order of the Court of Appeal of the State of California was not reported. The Order of the Supreme Court of the State of California was not reported.

Jurisdiction.

The order of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, was entered on May 13, 1982. The order of the Supreme Court of the State of California denying petitioner's petition for hearing was entered on June 30, 1982.

Under 28 U.S.C. Section 1257(3), petitioner sought this Court's jurisdiction.

On January 24, 1983, this Court entered an order granting a hearing.

Constitutional Provisions Involved.

United States Constitution, article III, section 2, subparagraph (1).

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

United States Constitution, first amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, sixth amendment.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, fourteenth amendment, section 1.

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

Petitioner was denied access to attend and observe the voir dire proceedings of a pending criminal trial in the respondent court. Further, petitioner was subsequently denied access to the transcript of the closed proceedings.

Petitioner, The Press-Enterprise Company, is a California corporation which publishes two newspapers of general circulation, the Morning Press Enterprise and the Evening Press Enterprise, from its principal offices located in Riverside, California.

Albert Greenwood Brown, Jr. was the defendant in a case entitled *People of the State of California v. Albert Greenwood Brown, Jr.*, Riverside Superior Court Case No. CR 18104. The action involved a complaint filed by the Riverside County District Attorney's Office seeking imposition of the death penalty against Mr. Brown, arising out of the murder and rape of a teenage girl. (A. 40-45)

On October 19, 1981, prior to the commencement of jury selection, an oral and written motion was made by petitioner to allow public access to the voir dire examination of prospective jurors. After argument by petitioner's counsel, counsel for Mr. Brown and counsel for the People of the State of California, respondent court, through the Honorable J. William Mortland, denied petitioner's motion to keep the entire voir dire examination public. The court's order at that time was that the death-qualifying of the jurors, pursuant to the California Supreme Court decision of *Hovey v.*

Superior Court, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980), would be done individually and in sequestration and outside the presence of the public. (A. 1, 46-51, 72-100)

Approximately three (3) days of open voir dire examination took place, and then the court, pursuant to its previous order, closed the remainder of the voir dire examination which lasted almost six (6) weeks. (A. 2-36)

On December 30, 1981, after the impanelment of the jury but before the calling of the first witness, petitioner again made an oral and written motion directed to respondent court, requesting that a complete transcript of the voir dire proceedings be released to the public. (A. 37, 52-60, 101-122)

Oral argument was heard from petitioner's counsel, counsel for defendant Brown and counsel for the People of the State of California. At the outset of the oral argument the court characterized the responses of the jurors as follows:

> "Most of them are of little moment. There are a few, however, in which some personal problems were discussed which could be somewhat sensitive as far as publication of those particular individual's situations are concerned." (A. 103)

Counsel for Mr. Brown argued first, that the real parties in interest to the motion were the prospective jurors who served on the entire venire panel. Secondly, counsel for Mr. Brown stated that the court would be violating the jurors' constitutional right of privacy if the transcript was released. (A. 104, 108)

At this hearing, counsel for the People of the State of California agreed with the position of counsel for Mr. Brown. In addition, counsel for the People argued that the

jurors answered questions under an "implied promise of confidentiality."

Counsel for the People summarized the closed voir dire proceedings as follows:

> "There was, throughout the proceeding, Your Honor, I think by the court's own words and actions, as well as the words and actions of the defense counsel, an implied promise of confidentiality regarding the subject matter of what was being discussed." (A. 111)

At this hearing, the court concluded as follows:

> "I agree with much of what defense counsel and People's counsel have said and I also, regardless of the public's right to know . . . I just think there is certain areas that the right of privacy should prevail and a right to a fair trial should prevail and the right of the people to know, I think should have some limitations, so at this state, the motion to open up anything that has been ordered sealed, including again, the individual sequestered voir dire proceedings is denied without prejudice." (A. 121)

On February 23, 1982, after Albert Brown had been tried, convicted, and sentenced to death, petitioner made an oral and written ex parte application for release of the transcript of the voir dire proceedings. (A. 39, 64-67)

Respondent court, after considering the application of petitioner for release of the transcript of the voir dire proceedings, denied the application and issued the following order:

> "The jurors were questioned in private relating to past experience, and while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." (A. 39)

Petitioner sought relief in the Court of Appeal for the Fourth Appellate District, Division Two, in a petition for writ of mandate to compel the respondent court to vacate its order and release the transcript to the public, and order

the respondent court to vacate its order denying petitioner's request to be present during the voir dire proceedings.

The appellate court, through the Honorable J. Douglas McDaniel, Acting Presiding Justice, summarily denied petitioner's request without articulation.

Immediately following the Court of Appeal order, petitioner sought a hearing with the Supreme Court of the State of California. On June 30, 1982, the Supreme Court of the State of California denied petitioner's request for a hearing.[1]

Three orders by respondent court are submitted to this Court for review on certiorari jurisdiction: the initial order closing the death-qualifying of the voir dire proceedings; the second order, December 30, 1981, sealing the transcript, without prejudice, after the voir dire proceedings were concluded; and, the permanent order sealing the transcript entered on February 23, 1982.

Summary of Argument.

The public's right of access to criminal trials, specifically the voir dire proceedings in a capital case, is the primary issue before the court.

The trial court used as its rationale for closing the courtroom in the first instance the California Supreme Court case of *Hovey v. Superior Court*. The *Hovey* decision requires that jurors be selected individually and in "sequestration." The Supreme Court based its decision upon a study which was undertaken to determine the effects of death-qualifying questioning of prospective jurors in capital cases. There was nothing in the study nor in the issues before the *Hovey* court which involved the influence of the public or press upon

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[1]The order entered by the California Supreme Court on June 30, 1982, indicated that Chief Justice Rose Bird, the author of the opinion in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980), requested that the case be heard.

the prospective jurors. Further, the opinion in *Hovey* specifically says that the ruling should have no impact upon the openness of the trial.

The trial court erred in the application of *Hovey*. The *Hovey* decision can be applied without closing the courtroom. The decision does not require closure in order to accomplish its purposes.

If the decision is interpreted, however, to require closure of the courtroom, it is in that respect unconstitutional in that it would violate the right of petitioner to access to the courts. The use of the word "sequestration", without definition, renders the decision vague and overly broad.

After the jury was impaneled in secret, petitioner attempted to obtain a transcript of the proceedings. The respondent court, supported by prosecution and defense counsel, held that the right of privacy of jurors was at issue since the questioning had delved into several areas which, in its opinion, should be sheltered from public view. On that basis the court sealed the transcript of the secret proceedings.

Petitioner's right of due process was violated in the handling of the privacy question by the trial court. If any right of privacy of jurors came into conflict with the petitioner's First Amendment right of access, petitioner should have been given notice and an opportunity to be heard. The respondent court did not so provide.

Petitioner's right of access to the voir dire proceedings should be established by a decision of this Court, and the respondent court should be required to release the transcript of those proceedings.

ARGUMENT.

I.

THE PUBLIC HAS A FIRST AMENDMENT RIGHT OF ACCESS TO THE VOIR DIRE PROCEEDINGS OF CRIMINAL TRIALS.

The public, including the press, has traditionally had access to criminal trials. The right of access evolved historically in the common law and has been established as a constitutional right. This right applies to the entire trial, with the instant focus on the voir dire proceedings in capital cases.

A. The *Richmond* and *Globe* Cases Established a First Amendment Right of Access to Criminal Trials.

This Court, in *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980), clearly enunciated the fundamental concept that the public has a right to attend criminal trials.

> "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' *Branzburg, supra*, 408 U.S. at 681, 92 S.Ct. at 2656." *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. at 580.

This important concept was reaffirmed by this Court in *Globe Newspaper Company v. Superior Court*, 102 S.Ct. 2613 (1982). In that decision the majority opinion described *Richmond* as having "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Company*, 102 S.Ct. at 2618.

B. Voir Dire Is an Integral Part of the Trial.

This Court is now asked to clarify the right of access to the courts and to focus upon a specific portion of the criminal trial, the selection of the jury in a capital case.

While this Court has not passed upon this specific question, the subject was addressed recently by the Ninth Circuit Court of Appeals in *United States v. Brooklier*, 685 F. 2d 1162 (9th Cir. 1982). That case involved a district court's partial closure of the voir dire of prospective jurors. The government contended that the public's right of access applied only to "trials", and that the voir dire was a pre-trial procedure, and thus not under the umbrella of the *Richmond* case. The circuit court disagreed, stating that the voir dire is considered "part of the trial itself," citing other appellate courts on this important principle. *Id.* at 1167.[2] The court then noted two basic principles supporting the right of access. First, historically criminal trials have "been open to the press and general public," and second, the public's access to criminal trials "plays a particularly significant role in the function of the judicial process and the government as a whole." *Brooklier*, 685 F. 2d at 1167. The Ninth Circuit Court of Appeals could find no historical evidence that voir dire was ever conducted in secret. *Id.*

In California, the impaneling of the jury has been considered a part of the public trial guaranteed to the defendant by the Sixth Amendment. *People v. Tietelbaum*, 163 Cal. App. 2d 184 at 206, 329 P. 2d 157 at 172 (1958). The right to voir dire by counsel was established in California in 1855. *People v. Badrus*, 5 Cal. 275 (1855). Since that time the

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[2] *United States ex rel. Pulitzer Publishing Co.*, 635 F. 2d 676 (8th Cir. 1980); *Commercial Printing Co. v. Lee*, 262 Ark. 87, 553 S.W. 2d 270, 271 (1977); *Great Falls Tribune v. District Court*, 608 P. 2d 116, 120-121 (Mont. 1980).

voir dire process has often been reviewed by the California courts but it has never been considered as a closed proceeding. The voir dire, like the rest of the trial, has been considered by the courts to be naturally and historically an open process.[3]

C. Open Voir Dire Benefits and Strengthens the Entire Trial Process.

The right of trial by jury is unique to the democratic form of government. Blackstone, in his third book of *Commentaries*, chapter 23, refers to trial by jury as a trial "per pais", or by the country. He then elucidates upon the democratic nature of the institution and how the people esteemed it so highly that through the centuries no changes in government could "ever prevail to abolish it." 3 *Blackstone Commentaries* 271 (G. Tucker ed. 1803).

Blackstone did not expressly state that the jury selection process had to be an open one. It is implicit in an understanding of the institution. It is inconceivable that the populace that insisted upon the existence of the institution would be denied access to the process of selecting its members.[4]

When the jury as an institution crossed the Atlantic to America, it became in colonial times a symbol of rebellion against the Crown and a "bulwark in favor of democracy",

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[3]*People v. Williams*, 29 Cal. 3d 292, 628 P. 2d 869, 174 Cal. Rptr. 317 (1981); *People v. Murphy*, 35 Cal. App. 3d 905, 111 Cal. Rptr. 295 (1973); *People v. Edwards*, 163 Cal. 752, 127 P. 58 (1912).

[4]The importance of the public nature of the jury process is emphasized by Blackstone in dealing with another portion of the jury process. He refers in Chapter 23 of the third book of *Commentaries* to two types of verdicts in use in the 18th Century, a privy verdict and a public verdict. Occasionally, the jury, in order to be "free of their confinement" gave their verdict in privy to the court. Any such act would have to later be followed by an open or public verdict. The law was clear that only the public verdict was the "effectual and legal verdict", and, indeed, if a conflict existed between the two verdicts the public one prevailed. 3 *Blackstone Commentaries* 292 (G. Tucker ed. 1803).

R. Simon, *The Jury, Its Role in American Society* 5 (1980). The Zenger trial was a case in point, wherein the jury resisted the pressures of the government by acquitting Zenger of a charge of seditious libel. Where the jury is viewed as a protector of the public against the government, the selection of the members of the jury certainly cannot be done in secret by representatives of the government.

Frequently, today, all of the people involved in the criminal process are employees of the government, *i.e.*, the judge, the prosecutor, and the public defender. Respondent's position permits them to select the jury in secret.

Trial by jury as an institution carries with it the concomitant demand "that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950). This Court has long held that "A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1942).

A fundamental goal of society is to see that its members, when accused, are given a fair trial. In pursuit of this goal, appellate courts routinely review the voir dire examination to pass upon the question of whether a fair and impartial jury was impaneled. In each of the following cases this Court looked to the voir dire process to help determine if the defendant had received a fair trial: *Murphy v. Florida*, 421 U.S. 794 (1975); *Beck v. Washington*, 369 U.S. 541 (1962); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Stroble v. California*, 343 U.S. 181 (1952); *Shepherd v. Florida*, 341 U.S. 50 (1951).

Just as this Court must look to the voir dire process to test for fairness, so must the public have access to the

process to make its own determination of fairness. Without an open voir dire process the public is unable to make an informed judgment of the entire trial proceedings since it is during voir dire that the trier of fact is selected.

An open jury selection process provides an educational opportunity to society as a whole. This Court in *Richmond* cited 6 J. Wigmore, *Evidence* 1834 (J. Chadbourne Rev. 1976):

> "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." *Richmond*, 448 U.S. at 572.

This rationale is particularly applicable to the narrow question of the public's right of access to the voir dire proceedings. In order to have confidence in the system the public must be aware of the process by which members of the jury are selected.

Generally, an entire community cannot serve on a jury. This Court has noted that a natural historical progression has resulted in a delegation of twelve members of the community to serve as jurors, but "the community did not surrender its right to observe the conduct of trials. The people retained 'a right of visitation' which enabled them to satisfy themselves that justice was in fact being done." *Richmond Newspaper v. Virginia*, 448 U.S. at 571.

The importance of the voir dire proceedings is magnified by the nature of the instant case. This voir dire involved the selection of twelve individuals who found the defendant guilty of murder and imposed the death penalty. Society's need for an understanding of its judicial process is most acute in a capital case. When these twelve members are

secretly selected to determine whether the government shall take a life, how can society satisfy itself that justice is done, when the qualifications, competence, and fairness of these representatives of the community cannot be known or assessed?

II.

THE RESPONDENT COURT IN CLOSING THE COURTROOM AND SEALING THE TRANSCRIPT VIOLATED PETITIONER'S FIRST AMENDMENT RIGHTS.

The trial court entered three orders that have been submitted to this Court for review. On October 19, 1981 respondent court ordered that the voir dire proceedings concerning death-qualifying of the jurors be closed. This was based upon the court's interpretation and application of the California Supreme Court decision of *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980). This was followed by three days of voir dire open to the public, and almost six weeks of closed voir dire.

After the jury was impaneled, but prior to the calling of the first witness, the court, at the December 30, 1981 hearing, denied without prejudice petitioner's request to release the transcript of the voir dire proceedings.

Finally, at the February hearing, after the defendant had been tried, convicted, and sentenced to death, the court denied petitioner's ex parte application to release the transcript of the closed voir dire proceedings. The last two rulings were apparently based upon a right of privacy of prospective jurors.

The initial order of respondent court excluding the public from the voir dire proceeding may not at first appear to be an appropriate subject for review by this Court. Since the voir dire has been completed and the trial is over, the question arises as to whether a live controversy remains. Under article

III, section 2 of the United States Constitution, this Court's jurisdiction extends only to actual cases and controversies. Ordinarily this Court will not accept a case for review which has been rendered moot.

In *Globe Newspaper Company, Inc. v. Superior Court*, 102 S.Ct. 2613 (1982), this Court determined that the issue of the exclusion of the press and public during the trial involving a minor victim was not moot within the meaning of Article III. In arriving at this conclusion, the Court stated that it could be reasonably assumed that others would some day be subjected to a similar exclusion, and that the order would likely evade review because of the typically short duration of criminal trials.

The initial closing of the voir dire proceedings in this case is also one "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Even in this trial court's small jurisdiction, there have been numerous instances of court closure on the same rationale.[5] Typically, an order closing the voir dire is of short duration and cannot be reviewed during the pendency of the proceedings. Under the rationale of *Globe Newspaper v. Superior Court*, this issue remains an appropriate subject for review by this Court. See also *Nebraska Press Asso-*

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[5]Since July, 1981 in Riverside County there have been a variety of applications of the *Hovey* mandate; in two cases the courts held an open voir dire (*People v. Flores*, CR 18960; *People v. Malone*, ICR 7162); in three cases voir dire was closed to the public during the death-qualifying questions (*People v. Burgener*, CR 18088; *People v. Weyant*, IRC 7117; and *People v. Huffman*, CR 18777; and in two cases the entire voir dire was closed (*People v. Boyde*), CR 18348; *People v. Smith*—transferred to San Diego Superior Court CRN 6940).

In those cases that were closed totally or in part, four courts did not seal the transcripts of the voir dire proceedings (*Malone, Flores, Weyant* and *Huffman*), two courts sealed the transcripts but released them at a later date (*Smith* and *Burgener*), and two courts sealed the transcript permanently (*Boyde* and the instant case).

ciation v. Stuart, 427 U.S. 539 (1976); *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Roe v. Wade*, 410 U.S. 113 (1973).

There can be no doubt that a live controversy remains as to the respondent court's order sealing the transcript of the voir dire proceedings. This order remains in effect until further order by an appellate court under proper review and thus qualifies as an actual case or controversy under article III, section 2 of the United States Constitution.

The initial exclusion from the courtroom violated petitioner's First Amendment rights and access to the transcript at this time will not fully remedy the wrong which occurred. The transcript is a poor substitute for actually being in the courtroom. Present during the proceedings, an observer can note many aspects which are not reflected in the transcript. The transcript does not provide the observer with a clear picture of the mood of the proceedings, or record the demeanor and mannerisms of participants and witnesses. Nonetheless, access to the transcript at this time would provide some knowledge regarding the voir dire proceedings in this case and should be made available to the public.

A. The California Supreme Court Decision in *Hovey v. Superior Court* Cannot Be Used to Close the Courtroom.

1. *Hovey* Does Not Require the Closure of the Courtroom.

The initial order of the court was based on the California Supreme Court case of *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980). This decision is not a proper basis for excluding the public from the voir dire proceedings.

The California Supreme Court was faced in *Hovey* with the question of whether a juror should be removed from the panel in a capital case because the juror was "unequivo-

cally" opposed to the imposition of the death penalty. *Hovey v. Superior Court*, 28 Cal. 3d at 7. On that specific issue, after considering almost two dozen studies, experiments, and surveys, the court decided that there was insufficient evidence at that time on which to reverse the trial court's order excluding such jurors from the panel. *Id.* at 68-69.

Thereafter, the *Hovey* court went on to discuss and ultimately decide that the procedure for identifying death-qualified jurors used in California was potentially prejudicial to a defendant's right to a fair trial. In arriving at this decision, the court relied upon a single study by Dr. Craig Haney, Assistant Professor of Psychology at the University of California at Santa Cruz. The study, conducted in 1979, polled only 67 persons who had viewed a simulated video-tape voir dire proceeding. The participants were divided into two groups. Both groups viewed the same voir dire video-tape, but the "experimental" group was shown an additional half an hour of death-qualifying voir dire.

The California Supreme Court summarized the Haney study in its opinion as follows:

> "Haney's findings indicate that the current process of selecting capital jurors creates certain side effects which shape the jury's attitudes toward a death sentence. . . .
>
> "Haney testified that the prejudicial alteration in attitudes which resulted from a juror's observation of the death-qualification of his or her fellow prospective persons is 'a function of exactly how extensive the questioning becomes. The more extensive the questioning, the more you would expect to find important differences between the state of mind of jurors who have been through the one process as compared with those who have been through the other.' This proposition implies a corollary: 'The extent to which [these

effects] are minimal will be a function of the extent to which the questioning is minimized.' "

Hovey v. Superior Court, 28 Cal. 3d at 79, 80, 616 P. 2d at 1353, 168 Cal. Rptr. at 180, 181.

Based upon the Haney study, the California Supreme Court concluded its opinion as follows:

"In order to minimize the potentially prejudicial effects identified by the Haney study, this court declares, pursuant to its supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying, the jury should be done individually and in sequestration. This rule will not in any way affect the open nature of a trial. Although trial counsel or the court may pose general questions to the panel, the venirepersons should not respond to any questions beyond those routinely asked in any criminal trial until they are outside the presence of their fellow venirepersons."

Hovey v. Superior Court, 28 Cal. 3d at 80, 81, 616 P. 2d at 1354, 168 Cal. Rptr. at 181.

The Haney study did not attempt to evaluate any effect the presence of the public had upon prospective jurors during the voir dire. The *Hovey* decision, likewise, does not address the issue of the presence of the public and press during voir dire.

Respondent court's initial order closing the voir dire was obviously invoked to protect the defendant's Sixth Amendment right to a fair trial. In this regard petitioner acknowledges that the public's right of access is not absolute and in limited circumstances must yield to defendant's Sixth Amendment rights. In those limited situations, articulated findings, based on a court's consideration of reasonable

alternatives short of closure, must produce a clear overriding interest which requires closure of the courtroom.

Reasonable alternatives were considered in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). In that landmark case this Court dealt with a prior restraint. The Court in the instant case is not faced with a prior restraint per se. Instead of allowing the public access and then ordering the media restrained from publishing, respondent court simply closed the courtroom. The effect is the same. The free flow of information to the public is curtailed. Denial of the public's right of access in the instant case and the prior restraint in the *Nebraska Press Association* case are similar evils that warrant similar constitutional treatment. The respondent court did not consider reasonable alternatives short of barring the press and the public from the trial.

2. If the *Hovey* Mandate Is Used to Deny a Right of Access to the Court, the Mandate Is Unconstitutional.

The California Supreme Court's mandate in *Hovey* regulating First Amendment freedoms was not drafted with narrow specificity. The California Supreme Court's failure to adequately define sequestration renders the mandate unconstitutionally vague and ambiguous. The mandate taken on its face could be interpreted to mean sequestration of the jury in the traditional sense which means that the jury is removed from public contact; it is set apart.[6]

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[6] *Black's Law Dictionary*, Fifth Edition (1979) defines sequester as follows:

> To separate or isolate: e.g. to sequester jurors is to isolate them from contact with the public during the course of a sensational trial.

The *Oxford English Dictionary*, Volume IX (1970) defines sequester as follows:

> 1. To set aside, separate. (a) To separate and reject; to eliminate; chiefly in material sense, to set aside, dismiss from consideration. . . . (e) To seclude (a person, thing or place) from general access or intercourse; to keep apart from society.

Hovey v. Superior Court is different than ordinary appellate decisions and different from most cases decided by California's highest court in a very important respect. *Hovey* mandated a specified process for the selection of jurors in capital cases. It was based upon the California Supreme Court's "supervisory authority over California criminal procedure". *Hovey*, 28 Cal. 3d at 80, 616 P. 2d at 1354, 168 Cal. Rptr. at 181. It not only decided the case before it, but it had the same force and effect as an addition to the California Penal Code regarding jury selection in capital cases. The case was decided without participation by any party representing the public's First Amendment rights.

Appellate decisions, including those of the California Supreme Court, can later be used as precedent or distinguished, depending upon the facts and circumstances of individual cases. Such is not the case with *Hovey v. Superior Court*. It applies to any criminal case in which the State of California is seeking imposition of the death penalty. Thus it should be reviewed by the same standard as legislative enactments.

Webster's Third New International Dictionary (1968) defines sequester as follows:

1. . . . To set aside for safe keeping, surrender, remove, separate, . . . (a) To set apart, separate for special purposes . . . (c) To hide from public view; withdraw from circulation; seclude, secret . . .

Webster's New International Dictionary, Second Edition (1934) defines sequestration as follows:

1. Act of sequestering or state of being sequestered; . . . (a) separation; disjunction; a putting or setting aside; (b) a withdrawing; retirement; seclusion, as from society.

The *Random House Dictionary of the English Language* (1967) defines sequestration as follows:

1. Removal or separation; banishment or exile.
2. A withdrawal into seclusion; retirement. . . .

The *Hovey* mandate is overly broad and vague concerning the proper application of "sequestration".

In *Globe Newspaper* this Court stated that the mandatory provision of the Massachusetts statute calling for closure of the court in sex crimes where the victims were minors was unconstitutional because it was not narrowly drawn and tailored to serve a particular interest. The same analysis can be applied to the *Hovey* mandate. The California Supreme Court's failure to define sequestration has led to confusion in the application of that mandate and court closures throughout the State of California. Since the mandate was not narrowly tailored to serve the state's interest in avoiding the prejudicial effects described in the Haney study, the mandate is unconstitutional.

This Court has reviewed many statutes limiting First Amendment rights. Such statutes were subject to attack through the due process clause on the grounds that they were vague and ambiguous. *NAACP v. Button*, 371 U.S. 415 (1963); *Smith v. People of the State of California*, 361 U.S. 147 (1959); *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1942); *Stromberg v. People of the State of California*, 283 U.S. 359 (1930).

In *NAACP v. Button*, this Court noted that "it makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon the absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of a sweeping and improper application." *NAACP*, 371 U.S. at 432, 433. A well-settled concept in the area of First Amendment rights is that "standards of permissible statutory vagueness are strict in the area of free

expression," *NAACP v. Button*, 371 U.S. at 432. This Court is asked to apply the same analysis to the mandate contained in *Hovey v. Superior Court*.

B. In Asserting the Right of Privacy of Prospective Jurors Respondent Court Violated Petitioner's Right of Due Process.

After the voir dire was completed the respondent court's orders were based upon an asserted right of privacy of prospective jurors, and the promises of confidentiality made by trial counsel and the court. Petitioner does not know the extent of the promises. The only record available to petitioner is the argument of counsel and the comment of the trial court. (A. 101-122)

The oral argument on petitioner's December 30 motion to release the transcript of the voir dire proceedings emphasizes two important facts: First, the privacy protection was given to the jurors by the court after voir dire had been completed in secret; Second, not all of the closed voir dire related to what counsel considered "sensitive and private" areas. These facts are significant for analyzing the procedural aspects of petitioner's First Amendment rights and any right of privacy of prospective jurors.

This Court has firmly established that petitioner has a right of access to criminal trials. This right must be afforded the same procedural due process protection accorded all other constitutional rights. At a minimum, due process requires notice and the opportunity to be heard. This is not a difficult concept in relation to the specific right of access to the voir dire proceedings. The Ninth Circuit Court of Appeals in *Brooklier* noted two procedural prerequisites to closing a criminal proceeding to the public: (1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections; and (2) the reasons

supporting closure must be "articulated in findings." *United States v. Brooklier*, 685 F. 2d at 1167-1168.

Neither of these prerequisites were met in this case. When the issue of alleged privacy of prospective jurors arose, if at all, the petitioner had already been excluded from the courtroom. The only notice of the privacy question was given after the voir dire was completed, at the hearing on December 30, when petitioner sought a release of the transcript.

In order for notice and hearing to be meaningful, petitioner should have prior knowledge of the assertion of the right of privacy. Such knowledge must include all of the surrounding facts and circumstances which includes the personal characteristics of the juror, and the nature and extent of the questioning.

The only reasons given by the court after the trial was completed were that "while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." (A. 39) According to counsel's comments the "sensitive and private" areas alluded to by the court involved race, sex, politics and religion. (A. 104)

This after-the-fact justification, based on these mere conclusionary statements of trial counsel and respondent court, falls short of the "articulated findings" required by *Richmond* and *Brooklier* and hardly qualifies as a "weighty justification" required by this Court in *Globe Newspaper*.

When focusing on this asserted right of privacy, no consideration of the defendant's Sixth Amendment right to a fair trial is involved. Under the present state of the law in California almost any question that trial counsel asks during the voir dire proceedings is allowed and must be answered. The conflict therefore is between a prospective juror's as-

serted right of privacy and the petitioner's established First Amendment right of access.

In this context a court should consider the public's interest that "society's criminal process 'satisfy the appearance of justice' " in the selection of an impartial jury. *Richmond Newspaper v. Virginia*, 448 U.S. 571; *Offutt v. United States*, 348 U.S. 11 (1954); that "what transpires in a courtroom is public property", *Craig v. Harney*, 331 U.S. at 374; that "judicial proceedings arising from prosecutions, however, are without question, events of legitimate concern to the public", *Cox Broadcasting System v. Cohen*, 420 U.S. 469, 492 (1975); and finally, and most importantly that, "openness in court proceedings may improve the quality of testimony". *Globe Newspaper Company, Inc. v. Superior Court*, 102 S.Ct. at 2622, n. 26, quoting *Gannett*, 443 U.S. at 4383.

The Court in *Globe Newspaper* construed the mandatory provisions calling for closure of Massachusetts courtrooms in cases involving minor victims of sex crimes as being too broad and not "narrowly tailored" to serve the state's interests. *Globe Newspaper*, 102 S.Ct. at 2620. Should it be assumed a juror's right of privacy exists and that the state has legitimate concern in protecting that interest, then any rule or procedure must be "narrowly tailored" to serve that interest. In the instant case the court applied a blanket order to the entire voir dire and sealed the transcript.

The procedure used by respondent court in sealing the entire transcript is not "narrowly tailored" to serve any juror's right of privacy in these areas. The identity, age, experience and circumstances of each individual juror and the type of question asked must be considered before a trial court can decide that a legitimate right of privacy exists. These factors should have been considered by the respondent

court in reaching "articulated findings" to support any overriding interest.

Closing the voir dire and sealing the record creates a dangerous atmosphere which lends itself to perjury and other misconduct, including coverup. Most people will tell the truth when being questioned, but those few who are inclined to lie will be more likely to do so when there is no fear of being discovered. With closure, a court eliminates that fear by assuring that the responses of the prospective jurors will never be heard beyond that secret chamber and that no one will ever discover any lack of truthfulness in the answers given.

It is clear from the record below that respondent court did not procedurally protect petitioner's right of access and therefore the order sealing the transcript must be vacated.

Conclusion.

There is an ominous progression; first, the *Hovey* mandate itself, vague and hardly overburdened with empirical evidence to support it; then, trial court interpretation of the mandate to order exclusion from the death-qualifying examination of the public rather than the simple separation of venirepersons, each from the others; then, a broadening of the cited exclusion to apply to the general, as well as the death-qualifying questioning—the closing of the entire voir dire process; now the permanent sealing of the transcript of the entire voir dire.

Thus, a monster grows, and there has been a disturbing unwillingness on the part of California appellate courts to protect the public's young First Amendment right of access. But if it is not confronted, the spread will continue.

For if the procedures described are wise in capital case, why not in non-capital cases? Few courts would proudly argue for secret voir dire and permanently sealed transcripts

of voir dire proceedings in all cases. Yet that is the direction; and if logic and law support what has already evolved in the wake of *Hovey*, logic and law will support the frightening extension of the application described.

The order of the respondent court closing the voir dire should be vacated and the court should be ordered to release the transcript.

Respectfully submitted,

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